BEFORE THE
SUBCOMMITTEE ON COAST GUARD
AND MARITIME TRANSPORTATION

STATEMENT OF
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THE NATIONAL CUSTOMS BROKER AND FORWARDERS ASSOCIATION OF AMERICA, INC.

June 19, 2008

Mr. Chairman, I am Mary Jo Muoio, President of the National Customs Brokers and Forwarders Association of America (NCBFAA) and Senior Vice President of Barthco International, a company providing international logistics services. NCBFAA is the national association for companies providing a wide variety of similar such services in the air, sea and land modes of transportation. As relevant here, the members of the NCBFAA provide the US exporters and importers, particularly the smaller and intermediate sized companies, with the transportation and logistics services that are essential to the movement of their goods in international trade.

In their roles as what the Shipping Act refers to as Ocean Transportation Intermediaries, the members of the NCBFAA are an essential cog in arranging for international ocean shipping both into and out of the United States. The Shipping Act defines an Ocean Transportation Intermediary as including both ocean freight forwarders and non-vessel operating common carriers (or NVOCCs). (Section 3(17))[1]. Both ocean freight forwarders and NVOCCs arrange for

[1] 49 U.S.C. §40102(19).

the actual movement of cargo aboard the vessels owned or operated by the various steamship lines, but are regulated somewhat differently depending upon which particular function these entities perform. Without getting into too much detail at this point, suffice it to say that both ocean forwarders and NVOCCs are subject to extensive regulation by the Federal Maritime Commission and, accordingly, the NCBFAA is pleased to have the opportunity to discuss our experience with the Commission's implementation of the Act.

NVOCC Regulation

At the outset, it is worth noting that ocean freight forwarders and NVOCCs are the only entities that are subject to the licensing and bonding requirements of the Shipping Act. More specifically, Section 19 of the Act requires that any company in the United States providing services as an ocean freight forwarder or NVOCC must be licensed by the Commission and otherwise obtain and maintain a surety bond or other proof of financial responsibility that would be available to pay claims to the public or government arising out of their ocean transportation related activities. In addition, although foreign-based NVOCCs are not subject to the Commission's licensing requirements, they are also required to maintain FMC-mandated levels of financial responsibility.

The NCBFAA has long supported the Commission's implementation of these requirements. We believe that the licensing and bonding provisions of the Act are useful to the public both from the standpoint of enhancing the professionalism and expertise of the intermediary industry and for providing at least some minimal level of protection to members of the shipping public on matters arising out of intermodal ocean transportation. In addition, from a security standpoint, there is something to be said in support of having a system in which the public can be assured that ocean freight forwarders and NVOCCs have a recognized track record of expertise and competency. In that way, both the vessel operators and the government can have some level of assurance that the cargo that is booked and/or tendered by ocean freight forwarders and NVOCCs is less likely to be a threat to security and that the import and export data flow to the various governmental agencies is likely to be accurate. The NCBFAA accordingly believes that the Commission's vetting process has tended to set the right balance of establishing reasonable standards as a precondition to licensure without being unduly burdensome.

Another aspect of current regulatory policy, however, does carry undue and totally unnecessary burdens – namely, the requirement that NVOCCs publish and maintain rate tariffs. Section 8 of the Act[2] requires that both the vessel operators and NVOCCs publish the rates (or, "tariffs") to be charged to the shipping public for moving cargo in international commerce. This is the embodiment of the concept of common carriage that was originally established, for ocean shipping, in the Shipping Act, 1916. The idea behind common carriage, of course, was to prevent undue discrimination, so that all similarly situated shippers would be entitled to receive a comparable rate from any carrier. The passage of the Ocean Shipping Reform Act of 1998 (OSRA), however, substantially transformed the ocean shipping industry in a number of ways. Perhaps chief among those changes was the rapid and almost total shift from the public rates applicable to comparably situated shippers through the system *of common carriage* created by the Shipping Act, 1916 to the privately negotiated *contract carriage* system that exists today. This shift took place with respect to ocean common carriers in OSRA through the introduction of confidential service contracts, which enable vessel operating common carriers to negotiate individualized rates with each of their various customers. Thus, unlike before, carriers no longer

[2] 49 U.S.C. § 40501.

had to file extensive publicly available information with the FMC outlining the details of their charges (or, "rates").

While OSRA did not authorize NVOCCs to enter into confidential service contracts with their customers, the shift toward a contract carriage system with NVOCCs and subsequently their customers was just as significant as was the case with the steamship lines. In the post-OSRA environment, shippers no longer rely on rate tariffs in determining how or when to ship or in selecting which carrier or NVOCC to utilize. To the contrary, freight rates are almost always separately negotiated based on the involved **movements**, anticipated cargo **volume** and required **services** to be provided by the carrier. Four years ago, the NCBFAA filed a petition with the FMC requesting that the agency utilize its exemption authority, under Section 16 of the Act, to provide regulatory relief and exempt NVOCCs from having to publish and maintain freight tariffs in those situations where they have separately negotiated rates with their customers.[3] At the same time, several individual NVOCCs filed related petitions requesting the agency to use the exemption authority to grant a more narrow form of relief – namely, to permit NVOCCs to enter into confidential rate agreements with their customers in a manner that is comparable to the legal service contracts that are offered by vessel operators. The FMC ultimately did agree to utilize its exemption authority, but only to authorize NVOCCs to enter into what are called NVOCC Service Arrangements (or NSAs), and denied the broader relief sought by the NCBFAA.[4]

The grant of NSA authority has been little utilized by the industry for many reasons, but primarily because they are of little use to both shippers and NVOCCs. Consequently, these

[3] FMC Docket No. P5-03, "Petition of National Customs Brokers and Forwarders Association of America, Inc. for Limited Exemption from Certain Tariff Requirements of the Shipping Act."

[4] FMC Docket No. 04-12, *Non-Vessel-Common Carrier Service Arrangements,* 30 S.R.R. 598 (2004).

anachronistic regulatory requirements compel NVOCCs to continue to memorialize negotiated rates by publishing rate tariff form despite the clear record that those rate tariffs are almost never reviewed or used by customers, that NVOCC rates are almost uniformly negotiated individually with individual customers <u>and</u> <u>only</u> **later** published in tariff form, and that the cost of tariff publication needlessly increases NVOCC costs, reducing their flexibility and competitiveness.

In view of the continuing burden and unnecessary costs resulting from continuing this mandatory rate tariff publication, the NCBFAA will in the near future again request the FMC to utilize the liberalized exemption authority Congress provided in Section 16 of the Act[5] to exempt NVOCC rate tariffs from mandatory publication and enforcement. The NCBFAA believes that an affirmative response from the Commission would be consistent with the Congressional mandate that the agency reduce regulation in instances where this would not result in a substantial reduction in competition or be detrimental to commerce, but rather would be a very positive, pro-competitive step for the Commission to take.

Antitrust Immunity

Another issue of concern to the NCBFAA pertains to the antitrust immunity enjoyed by the steamship lines through Sections 5-7 of the Shipping Act[6]. The NCBFAA provided testimony on the subject to the Antitrust Modernization Commission and would of course be pleased to provide this Committee with a copy of that statement.

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[5] See 49 U.S.C. §40103(a), which provides:

> The Federal Maritime Commission, on application or on its own motion, may by order or regulation exempt for the future any class of agreements between persons subject to this part or any specified activity of those persons ***from any requirement of this part*** if the Commission finds that the exemption will not result in substantial reduction in competition or be detrimental to commerce….

Emphasis supplied.

[6] 49 U.S.C. § 40301 *et seq.*

Without unduly burdening this record, we should note that the NCBFAA is concerned about concerted action to set prices and limit competition. We are not concerned about the ability of the various steamship lines to enter into what are referred to as Vessel Sharing Agreements. The agreements tend to enhance efficiency and maximize the utilization of capacity, which is normally pro-competitive. [In this instance, there is no good reason for antitrust immunity to be necessary to protect pro-competitive behavior.]

Contrariwise, steamship lines are able to enter into immunized Agreements with their competitors in order to discuss rates and services collectively, jointly establish what are referred to as "voluntary guidelines" concerning the rates they collectively wish to establish, and agree to ration capacity in a way that regulates the number of sailings to or from U.S. ports. And, all this can be done, under current law, with the antitrust immunity afforded the steamship lines by the Shipping Act (as long as their Agreement has been filed with and not challenged by the FMC).

While OSRA does permit the carriers individually to enter into confidential contracts with their customers, the fact remains that the ability of the various steamship lines to collectively discuss and establish voluntary guidelines undoubtedly has the effect of escalating rates and surcharges to a level that is higher than would be the case if the carriers were required to compete with their competitors in the same way that is required of virtually every other industry.

This has a significant adverse effect upon the NVOCC industry. To understand this, it is helpful to look at NVOCCs as they are sometimes viewed by the steamship lines. On the positive side, many vessel operators see NVOCCs in a favorable light, as customers, which is not surprising given the amount of traffic controlled by NVOCCs. Indeed, some NVOCCs control and tender more cargo than even the largest so-called proprietary shippers. Similarly, when

NVOCCs consolidate smaller shipments into full container load lots, they are able to tender traffic that the steamship lines would otherwise not have enjoyed because it would have been too expensive to ship.

On the other hand, some carriers view NVOCCs with suspicion, as competitors, often refusing to enter into service contracts with NVOCCs on any basis or otherwise requiring that NVOCCs pay a higher freight rate than proprietary shippers. This necessarily means that the shipping rates to NVOCC customers – who tend to be the smaller and medium size shippers – are normally higher than the rates enjoyed by the larger so-called proprietary shippers that deal directly with the steamship lines.[7]

In 2002, the NCBFAA filed a petition with the FMC in an attempt to stem patently anti-competitive practices by the carrier members of what is called the Transpacific Stabilization Agreement ("TSA"), whose members control almost all of the vessel capacity in the trades between Asia and the United States. The TSA had collectively agreed to refuse to negotiate or enter into service contracts with NVOCCs until such time as they had completed negotiations and signed contracts with proprietary shippers. In addition, the TSA members had also collectively agreed to require NVOCCs as a class to pay substantially higher rates than proprietary shippers were paying TSA members for the same services. Ultimately, the Commission did issue an order of investigation[8] and ultimately, after its investigation, entered into a settlement agreement with TSA by which the TSA carriers were required to pay $1,350,000 to settle the charges brought against them for violations of the Act. In addition, the settlement agreement required the members not to repeat that misconduct.

[7] This is the case despite the fact that such discriminatory practices are specifically prohibited by the Act; *see* Sections 10(b)(10) and 10(c)(7), 49 U.S.C. §§ 41104(10) and 41105(7).

[8] *Fact Finding Investigation No. 25 – Practices of Transpacific Stabilization Agreement Members Covering the 2002-2003 Service Contract Season* (order of investigation served August 23, 2002.)

Unfortunately, the same situation has continued in recent years, in that the TSA members as well as members in other antitrust immunized agreements still have a double standard when dealing with their shipper customers (“proprietary shippers”) versus their willingness to tender services to NVOCCs. When negotiating service contracts, the steamship lines still refuse to negotiate with NVOCCs until they have concluded their negotiations with proprietary shippers. Similarly, it is still the normal practice that rates to NVOCCs are higher than those to proprietary shippers.

We believe that the ability of the antitrust immunized Agreements to collectively agree to limit capacity in the U.S. trades is currently having an acute and adverse effect on the ability of U.S. exporters to market their goods overseas. In other words, the carriers are able to collectively discuss how many vessels and sailings are appropriate in order to service shippers in any given area. This is akin to United, Delta and American Airlines collectively deciding how many flights they believe should be available to the traveling public between New York and Los Angeles. While it has been customary in the past for exporters to be able to book and obtain space on outbound vessels with two or three days’ notice, today it is not uncommon for shippers to have to book six to eight weeks in advance due to the lack of carrier capacity. While there are a number of reasons for this shortage of vessel and container capacity, the fact that the steamship lines can collectively decide to move capacity out of the U.S. trades is undoubtedly a contributing factor to the current difficulties confronting U.S. exporters.

Parenthetically, the ability of the steamship lines to enter into confidential service contracts with their customers, coupled with their antitrust immunity, has had the curious side effect of essentially deregulating the steamship lines by removing them from the continuing scrutiny of the FMC. In other words, as long as the carriers file their service contracts and their antitrust immunized agreements with the agency, the Commission appears to have little reason to devote any of its enforcement oversight to their activities. As a result, the Commission's enforcements efforts are now directed almost entirely at ocean transportation intermediaries. While it is true that ocean freight forwarders and NVOCCs should adhere to the affirmative statutory requirements of the Shipping Act, Commission staff is often engaged in exercises that seemingly attempt to micromanage the ocean transportation intermediary industry.

For example, the Commission recently determined that the U.S. agents of licensed ocean freight forwarders and NVOCCs needed also to have their own licenses and surety bonds without any reasonable explanation of the necessity for this redundant structure.[9] Similarly, it appears that the Commission may be focusing upon establishing rigid procedures for the cooperative, non-antitrust immunized working arrangements of NVOCCs that are intended to enhance operating efficiencies. The NCBFAA believes that, if antitrust immunity was removed, the Commission would be better able to expend its resources in detecting and dealing with large scale market distorting behavior that has a more significant effect on the shipping industry.

The NCBFAA has supported several recent efforts in Congress to repeal the antitrust immunity provisions of the Shipping Act[10] and agrees with the conclusions of the Antitrust Modernization Commission that the justification and support of the antitrust exemption under the Shipping Act is now "questionable" at best.[11] The Association therefore believes that any review of the Shipping Act should consider a complete repeal under those provisions.

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[9] FMC Docket No. 06-08, *In the Matter of the Lawfulness of Unlicensed Persons Acting as Agents for Licensed Ocean Transportation Intermediaries - - Petition for Declaratory Order* (decision served February 15, 2008); appeal pending in *Landsstar Express America, Inc. v. Federal Maritime Commission*, Case No. 08-1152 (D.C.Cir.). Curiously, the Commission recently moved to dismiss the appeal on the grounds, *inter allia*, that its decision was not ripe for review and that the NVOCC petitioner was not "aggrieved", despite the fact that every NVOCC risks the imposition of substantial penalties for any noncompliance with the decision.

[10] H.R. 1253, *Free Market Antitrust Immunity (FAIR) Act* 2001 (House of Representatives)

[11] *Report and Recommendations of the Antirust Modernization Commission*, April 2007, at 351-52.

Moreover, it seems odd that the United States is about to become the only country in the world that provides such protection from the antitrust laws to ocean carriers, most of whom are foreign owned and controlled. As this Subcommittee is well aware, the European Union is about to terminate the block exemption from its Competition Laws which the carriers have enjoyed for a number of years. Yet, it appears that the steamship line industry will be able to accommodate itself to the need to compete, rather than act collectively in Europe. We are not aware of any reason why shippers in the United States should not be entitled to expect the same competitive environment for ocean shipping as exists in Europe and elsewhere around the world.

Domestic Port Activities

Finally, while the NCBFAA and its members support efforts to reduce environmental pollution, the Association is very concerned about the Clean Truck Plan ("CTP") being espoused by the Ports of Los Angeles and Long Beach, California. As you are undoubtedly aware, the ports appear to have collectively developed a proposal that would both establish fees that are apparently intended for use to enhance port infrastructure and limit access to the ports to an arbitrarily narrow group of so-called "clean" trucks. It seems clear that the CTP will substantially reduce the already inadequate pool of cartage companies that are available to move containers into and out of the port, thus further exacerbating the problem that U.S. importers and exporters are having in effecting the movement of their goods.

The Association believes that the justification currently being offered in support of the substantial fees that the ports are contemplating is dubious at best. As currently proposed, these do not appear to be user fees that are reasonably related to offset the cost of services being provided by the ports, but instead are taxes intended to pay for port infrastructure and other initiatives. As such, they appear to be a constitutionally prohibited tax on exports as well as a violation of U.S. obligations under various trade agreements with respect to imports.

Moreover, the actions of the ports of Long Beach and Los Angeles raise significant questions under the Shipping Act. We are aware that the FMC is looking into the issue of whether the collective behavior of the ports, and their attempts to have that behavior insulated from antitrust concerns through an approved Agreement, contravenes Section 6(g) of the Act,[12] which prohibits substantially anticompetitive agreements. In addition, we understand that the FMC is also looking into the question of whether the CTP itself contravenes Section 10(d) of the Act, which prohibits marine terminal operators from engaging in unjust and unreasonable practices, unreasonably refusing to deal or negotiate cartage companies, and otherwise subjecting disfavored cartage companies to unreasonable prejudice or disadvantage.[13]

However, we are aware that the FMC announced last Friday that it had completed its review of the Agreement proposed by the ports of Long Angeles and Long Beach and had determined to let it take effect as of that day. While we are not privy to the facts that were presented to the Commission, and since its deliberations took place in closed door sessions, we are at a loss to understand how the agency could conclude that their proposal would not likely result in an unreasonable increase in transportation costs or any decrease in transportation services. At the very least, the fact that these two major ports were able to seek and obtain antitrust immunity of a proposal that will have a clear and dramatic effect on the ability to move cargo to and from these terminals again raises the question of how it is beneficial to US shippers for the FMC to retain this remarkable authority.

[12] 49 U.S.C. § 41307.

[13] 49 U.S.C. § 41106.

In summary, the NCBFAA believes that it is time to substantially amend the Shipping Act to more appropriately recognize the shift from the common carriage notions underlying the Shipping Act, 1916 to the contract carriage industry that has developed since the enactment of OSRA. The Association also believes that the FMC should continue to use its authority to free the industry from unnecessary regulation, so that the agency's oversight becomes more appropriate to the changing nature of the industry.

Mr. Chairman, this concludes my remarks. I will be happy to respond to your questions.